

WOR/MRL 4-3-19.

268-C

44. Part 1-665



MEMORANDUM FOR THE COMMISSION.

In compliance with the direction of the Commission, I am herewith submitting for issuance, a draft of a form of complaint against The Aeolian Company, charging certain practices as in violation of Section 5 of the Federal Trade Commission Act, as follows:

Maintenance of resale prices; requiring dealers who sell its instruments to market and promote same as leaders; refusal to sell certain music rolls except to purchasers of Aeolian pipe organs.

The Aeolian Co.,
29 W. 42nd St.,
New York, N.Y.

John Walsh
Chief Counsel.

April 3, 1919.

64/14/19

Return day 5-26-19

April 8/1919-
Complaint approved by the
Commission and ordered
to issue - Resolutions
adopted - J.P. Hoder, Secy
OP21-

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION: SS.

At a regular session of the Federal Trade Commission held
at its office in the City of Washington, D. C.,
on the *8th* day of *April* A. D., 1919.

PRESENT:

William B. Colver, Chairman,)	
John Franklin Fort,)	Commissioners.
Victor Murdock,)	
Huston Thompson.)	

-----X	
Federal Trade Commission :	Complaint in the matter of
:	the alleged violation of
:	Section 5 of an Act of Con-
:	gress approved September
The Aeolian Company. :	26, 1914.
-----X	

DOCKET No. 268

WHEREAS: The Federal Trade Commission has reason to believe that the Aeolian Company has violated, and is violating, the provisions of Section 5 of an Act of Congress approved September 26, 1914, by the maintenance of resale prices; requiring dealers who sell its instruments to market and promote same as leaders; and refusal to sell certain music rolls except to purchasers of Aeolian pipe organs, therefore be it

RESOLVED: That the Federal Trade Commission issue and serve upon the said Aeolian Company its complaint stating its charges in that respect in substantially the form hereunto annexed, and be it further

RESOLVED: That notice be given to the said Aeolian Company, as required by law, that the charges in said complaint will be heard by the Commission at its office in the Federal Trade Commission Building, 15th & K Streets, N. W., in the City of Washington* on the *26th* day of *May* A. D., 1919, at 10:30 o'clock in the forenoon of said day or as soon thereafter as it may be reached.

Adopted by the Commission.

Secretary.

268 - C

August 3, 1920

MEMORANDUM FOR DOCKET SECTION
CHIEF COUNSEL
CHIEF EXAMINER
BOARD OF REVIEW

The following action with reference to docket cases
was taken by the Commission today:

Docket No. 268 - F. T. C. Aeolian Company
Attorney Clark heard. Case committed to the custody of Mr.
Pollard to be called up at a meeting when Mr. Murdock is present.

By direction of the Commission.

J. P. Yoder
Secretary

268 - C

August 11, 1920

Memorandum for Docket Section
Chief Counsel
Chief Examiner
Board of Review

The following action with reference to docket cases was
taken by the Commission today:

Docket No. 268 - F. T. C. vs, Aeolian Company
Case presented by Mr. Pollard and left in the custody of the
Secretary to be later considered.

By direction of the Commission,

J.P. Yoder
Secretary

268-C

MEMORANDUM FOR THE COMMISSION

Docket 268 - Aeolian Company

In compliance with instructions of the Commission contained in the Secretary's memorandum of the 26th instant, I respectfully submit herewith stipulation, proposed findings of fact, and proposed order to cease and desist in the above entitled docket.

Adrian F. Busick

Acting Chief Counsel.

October 29, 1920.

*11/10/20 - approved as of
Oct. 26/1920 - One to be d
mailed*
J. H. Moore
Secretary



MBC/RMP 10-29-20.

MEMORANDUM FOR THE ACTING CHIEF COUNSEL.

Docket No. 268.
The Aeolian Co.

I am transmitting herewith the formal and informal dockets in the above case, together with (1) agreed statement of facts signed by respondent's attorney, which is to be signed by yourself as Acting Chief Counsel (perhaps the date should be changed.); (2) proposed Report and Findings, which are the same as those previously submitted to the Commission, with the exception that I have added on page 2, Paragraph Four, line 5, the words "purchased by them from respondent" in order to bring out clearly the fact that the goods in question were actually sold to the dealers by respondent (you will note that in the last line of Paragraph Three also occur the words "and sold by respondent".); (3) a proposed Order to Cease and Desist revised in accordance with the Commission's instructions. This revision has consisted in omitting the former paragraph (2), which read:

"Refusing to sell its said products or any of them to dealers because of the failure or refusal of such dealers to enter into any such contracts or agreements."

These changes, I believe, fully meet your own point as to the Findings, as well as the Commission's ruling as to the order, so that the Findings and Order as now

transmitted are ready to be submitted to the Commission
after you have signed the agreed statement of facts.

Respectfully submitted,

Marshall B. Clarke,
Attorney in Charge.

Dated Oct. 29, 1920.

October 26, 1920.

MEMORANDUM FOR THE ACTING CHIEF COUNSEL:

In the matter of the attached Docket No. 268, F.T.C. vs. The Aeolian Company, the Commission today rescinded its order of September 11th, dismissing its complaint, and approved and entered its finding of facts, conclusion and order to cease and desist after revisions. The findings and order are now transmitted for incorporation of the revisions and returned to the Office of the Secretary for service.

By direction of the Commission.

J.P.
Secretary.

October 19, 1920.

Memorandum for Acting Chief Counsel:

Upon consideration of your memorandum of October 15th, suggesting the possibility of error in the dismissal of the attached Docket No. 268, F.T.C. vs. The Aeolian Company, you are requested to appear with Attorney M. B. Clark before the Commission at 10:30 a.m., October 26, 1920.

By direction of the Commission.

J. P. Fox
Secretary.

10/26/20

Messrs. Busick and Clark heard -
Denial of reconsideration -
Findings and Order entered -

J. P. Fox
Secretary

MEMORANDUM FOR THE COMMISSION

Docket 268 - The Aeolian Company

In compliance with instructions from the Commission, through the Secretary, there is submitted herewith a form of order dismissing the complaint in the above case.

I take the liberty of inviting the attention of the Commission to the fact that the respondent in this case was willing to stipulate the facts and consent to the entry of an order to cease and desist from (1) maintaining resale prices on its player pianos, phonographs and phonograph records, and from refusing to sell these articles to dealers who failed to maintain resale prices, and (2) entering into contracts with dealers under the terms of which they are required to advertise the respondent's phonographs and records as such dealers' "unqualified leader of any and all goods of the phonograph type".

As the respondent was willing to stipulate the facts and submit to an order on these points, it occurs to me that there might possibly have been an error in transmitting the Commission's order which directs the dismissal of the complaint in its entirety.

Respectfully,

Adrian F. Busick

Acting Chief Counsel.

October 15, 1920.

10/19/20 -
Messrs. Busick & M. Belcher
to be heard Oct. 26 - 10:30 a.m.
J. P. H. [unclear]
Secretary

MBC-o--10/7/20

MEMORANDUM for ACTING Chief Counsel:

The Aeolian
Company---
Docket 268.

In accordance ^{of the Secretary, transmitted by you,} with ~~your~~ instructions I have prepared and submit herewith ORDER for DISMISSAL and DISCONTINUANCE of the above proceeding.

M. B. Clark

Attorney and Examiner.

September 11, 1920.

Memorandum for Chief Counsel:

The Commission today dismissed its complaint in the matter of the attached Docket No. 268, F.T.C. vs. Aeolian Company, and referred the record to the Chief Counsel with instructions to prepare and submit an Order of Dismissal.

By direction of the Commission.

Secretary.

10/26/20 Reconsidered

File

August 3, 1920.

MEMORANDUM FOR COMMISSIONER POLLARD

The attached docket No. 268, F.T.C. vs. Aeolian Co. is committed to your custody by the Commission, with the request that same be called up before the Commission at a time when Mr. Murdock is present.

By direction of the Commission,

J. P. Youn
Secretary.

*8/11/20 - Presented by Mr. Pollard -
Left in custody of Secretary
to be later considered*

J. P. Youn

July 30th, 1920.

MEMORANDUM FOR THE COMMISSION:

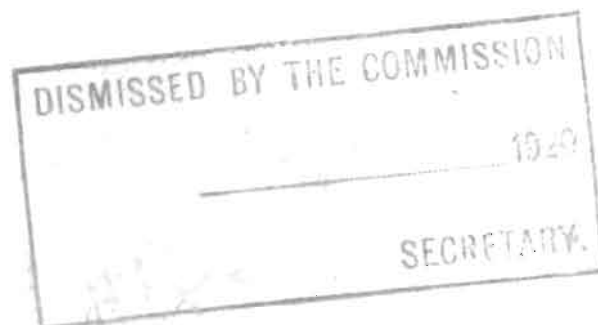
I am sending you herewith memorandum from
Attorney M. B. Clarke in re: Docket No. 268.

I am in accordance with the recommendation
of Mr. Clarke in this matter and hope that the Commission
may see its way clear to dispose of this matter as recom-
mended, at an early date.

Respectfully,

Claude R. Porter

Chief Counsel.



July 10, 1920.

Memorandum for the Chief Counsel:

DOCKET No. 268 - THE AEOLIAN COMPANY

I take the occasion of the receipt of the annexed letter, dated July 6, 1920, from Mr. George D. Beattys of New York, Attorney for the Aeolian Company, to call your attention to the fact that this matter seems to have gone astray. Mr. O. B. Johnson tells me that the papers are not with the Commission and that he has no record as to any disposition made of the matter by the Commission.

The facts in regard to the submission of the case to the Commission are as follows:

On February 5, 1920, I turned over to you for submission to the Commission, the original docket and other papers in the case, together with an agreed statement of facts, signed by respondent's counsel, proposed findings of fact and proposed order to cease and desist.

Accompanying these papers, I submitted a memorandum, dated February 5, 1920, stating all the facts with regard to the status of the case and apprising you that respondent's counsel had expressed a willingness to have an order issue against respondent as to certain of the charges contained in the complaint, but asking that the charge of refusing to sell organ-rolls except to owners of Aeolian organs be dismissed.

In my memorandum I reviewed the facts in the case and recommended that this course be pursued, and submitted findings and order as above stated, to this effect.

Thereafter you submitted the matter to the Commission and later on I attended before the Commission, when you were present, and the case was discussed, but went over, on motion of the Chairman, for further consideration by the full Commission. This occurred sometime in the Month of March, I believe. Since then, no further action seems to

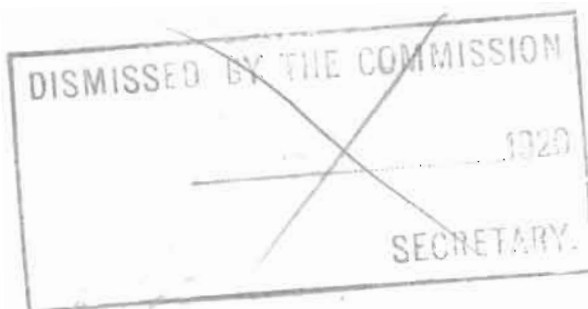
have been taken and the papers, as stated above, seem to have gone astray.

The annexed letter from Mr. Beattys requests that some action be taken in this case, and I, therefore, take this opportunity of calling it again to your attention. I am still under the belief that the proposed order, as submitted by me, is the best that could be obtained by a trial of the issues and that the charge as to the refusal to sell the organ-rolls to owners of Esty organs, should be dismissed as being under the circumstances disclosed, neither a violation of Section 3 of the Clayton Act, nor Section 5 of the Federal Trade Commission Act.

Respectfully submitted,

W B Clark

Attorney and Examiner.



MEMORANDUM FOR THE CHIEF COUNSEL.

DOCKET NO. 268

THE ABOLIAN COMPANY.

This is the case concerning which I spoke to you a week ago, in which Mr. George D. Beattys, of New York City, Counsel for the respondent made a proposition to me that the respondent would be willing to have an Order entered against respondent as to two of the charges in the complaint, if the third charge could be dismissed.

On your stating that you thought such an arrangement might be effectuated, provided the facts warranted it, I went over all the evidence of the case again and having convinced myself that the Order suggested by Mr. Beattys covers all that we could reasonably expect to establish on the evidence disclosed by the investigation, I prepared an Agreed Statement of Facts covering the two charges consented to by respondent's counsel and forwarded same to him.

This Agreed Statement of Facts has now been signed by Mr. Beattys and is submitted herewith for your consideration and signature. I also submit proposed Findings, which follow the language of the Agreed Statement of Facts; also an order to Cease and Desist, covering the practices which respondent acknowledges it has indulged in as follows:

1. Requiring purchasers of its phonographs, etc., to enter into contracts to resell at priced fixed by respondent.
2. Refusing to sell to dealers who will not enter into such contracts.
3. Issuing rules or directions requiring dealers to adhere to resale prices, and
4. Entering into contracts with dealers by which the latter agree to treat respondent's phonographs as "unqualified leader of any and all goods of the phonograph type".

The Order further provides that the third charge be dismissed without prejudice.

In order that there may be no misunderstanding between counsel in this matter I should like authority, if permissible, to send him a copy of the proposed Order before the same is issued. This will obviate any question arising hereafter as to whether the form of the Order complies with the understanding of counsel in the matter.

The charge which it is proposed to dismiss is contained in Paragraph Four of the complaint and is briefly that respondent refuses to sell its Aeolian pipe organ music rolls except to purchasers of pipe organs manufactured by it. I have thoroughly investigated this practice and have come to the conclusion that the equities of the case are entirely with respondent. There is only one other pipe organ on which these music rolls could be used in any event and that is manufactured by the Estey Company. The Estey Company, by altering its organs and copying the names used by respondent on the various stops of its organs, and imitating other exclusive features of the Aeolian organs, has brought it about that the music rolls manufactured by respondent can be used on the Estey organ but not with the best results. Now, these music rolls are not manufactured by respondent for profit. In fact the cost is so large that it would be impossible to market them if the full value was charged. They are not advertised by respondent nor sold through dealers. They are, however, supplied to purchasers of respondent's pipe organs (some of which cost many thousands of dollars) as an added inducement for having such organs installed in their residences. I find that it has been held by the Supreme Court in a case cited by respondent in 209 U. S., page 18, that these music rolls are in reality a part of the organs to which they are to be attached.

3

On the whole case I am thoroughly satisfied that this Order as proposed will work substantial justice in this case and that nothing additional would be gained by a trial of the issues.

Respectfully submitted,

Marshall B. Clark

Attorney and Examiner.

February 5, 1920.

Extract from minutes of October 19, 1920.

Form of Order of Dismissal, was submitted by the Chief Counsel pursuant to the Commission's action of September 11, 1920, in dismissing its complaint, together with memorandum of October 15th from the Acting Chief Counsel suggesting the possibility of error in dismissing the case in view of the respondent's willingness to stipulate the facts and consent to an Order to Cease and Desist from certain practices. It was directed that Acting Chief Counsel Busick and Attorney M. B. Clark appear before the Commission at 10.30 a.m., Tuesday, October 26th, for consideration of the case.

268-C

November 10, 1920.

Memorandum for Docket Section:
(Extract from Minutes.)

The following action with reference to docket cases was taken by the Commission to-day:

Docket No. 268, F.T. C. vs. The Aeolian Company.

Findings and Order entered in this case on October 26th with the direction that certain revisions then made be incorporated. In memorandum of October 29th, the Findings, etc., as revised were submitted and found to be in keeping with the Commission's instructions, and were referred to the Docket Section for service.

By direction of the Commission.

(signed) J. P. Yoder,
Secretary.

268 1

SEARS, ROEBUCK AND CO.
SEATTLE, WASH.

M. D. Clarke

April 26, 1920.

Federal Trade Commission,
Washington, D. C.

Attention of Claude R. Porter, Chief Counsel.

Gentlemen:

Referring to your dockets Nos. 268 and 269,
file No. JWN-WEF - J.N.N., Federal Trade Commission vs.
the Aeolian Company and Federal Trade Commission vs.
The American Graphophone Company, et. al.

Have any rulings or decisions been entered
in these cases? If so, we would appreciate a copy of
same.

These cases have been pending since last May.

Kindly address your reply for the attention
of the writer.

Thanking you for this courtesy, we are

Yours truly,

SEARS, ROEBUCK AND COMPANY

Per

M. J. Robinson

C



May 1, 1920.

Mr. M. J. Robinson,
Sears, Roebuck & Company,
~~Chicago, Ill.~~ *Seattle Wash*

Dear Sir:

I am in receipt of your letter of April 26th inquiring whether any ruling or decision has been made in the cases now pending before the Commission against the Aeolian Company and American Graphophone Company et al.

As the principal charge in both of the cases mentioned is resale price maintenance, enforced by ~~means of~~ systematic refusals to sell to any dealers failing to maintain specified prices, these cases, as well as others involving the same question, have been held in abeyance pending the decision by the circuit court of appeals in the Second Circuit (New York City) of the cases of Federal Trade Commission v. Beech-Nut Packing Co. In the latter case an order was entered by the Commission requiring the respondent to cease and desist from this practice; and thereafter the respondent petitioned the circuit court of appeals for review of the order. On Feb. 26, 1920, the latter court handed down its decision reversing the Commission's order, on the authority of the decision of the United States Supreme Court in the case of U. S. v. Colgate and Co. (250 U. S. 300). I enclose herewith a copy of this Beech-Nut decision. It is the intention of the Commission to apply for a review of this decision by the U. S. Supreme Court. As long as this decision stands unreversed, however, it is not the intention of the Commission to press other cases in which the complaints are based on similar facts. If the Commission succeeds in having the circuit court of appeals decision in the Beech-Nut case reversed, then all of these cases, including the two

-2-

mentioned by you, will be proceeded with forthwith.

Trusting that this answers your inquiry, I am

Respectfully,

FEDERAL TRADE COMMISSION.

Claude R. Porter,
Chief Counsel.

Enclosures.

SEARS, ROEBUCK AND CO.

SEATTLE, WASH.

June 16, 1919.

Federal Trade Commission,
Washington, D. C.

Gentlemen:

Referring to the citations of the Columbia Graphophone Company and the Aeolian-Vocalion Company on the charge of attempting to force dealers to maintain standard, fixed re-sale prices on their machines and records and of refusing to sell to dealers who insist on reselling to the public at their own prices.

These companies were cited to make an answer before you May 27th and 28th, respectively.

Will you kindly send us a copy of your decision or findings in this case?

Please address for the attention of the writer.

Thanking you in advance for this courtesy, we are

Yours very truly,

SEARS, ROEBUCK AND COMPANY ✓

Per

M. J. Robinson ✓

Rev. D. C.

June 24th, 1919.

Mr. M. J. Robinson,
Sears, Roebuck and Company,
Seattle, Wash.

Dear Sir:

FORMAL NO. 266.

Your letter of the 16th instant, making inquiry as to the Commission's formal complaints against The Aeolian Company (Docket 268) and the American Graphophone Company, et al (Docket 269), has been received.

In reply, you are advised that, although answers have been filed by the respondents in both of these cases, thereby putting them at issue, hearings were not held on the return dates (May 26th and 27th) because of the great number of pending cases on the Commission's docket. Furthermore, the Commission as yet has arrived at no final decisions.

I am enclosing herewith copies of the complaints in question for your information.

Very truly yours,

FEDERAL TRADE COMMISSION.

Edward L. Smith.
Acting Chief Counsel
for the
Commission.

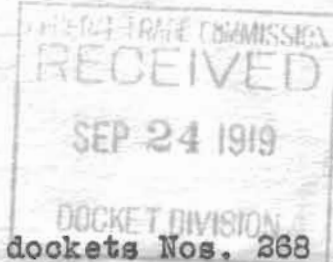
Enc.

SEARS, ROEBUCK AND CO.
SEATTLE, WASH.

268-13

September 19, 1919.

Federal Trade Commission,
Washington, D. C.



Gentlemen:

Referring to your dockets Nos. 268
and 269, file No. JWN:EHS 6-24-19, Federal
Trade Commission vs. The Aeolian Company and
Federal Trade Commission vs. The American
Graphophone Company, et. al.

Kindly send us copies of any rulings
or decisions which have been entered in these
cases.

Thanking you in advance for this
courtesy, we are

Yours very truly,

SEARS, ROEBUCK AND COMPANY

Per

P.S.

Kindly address for the attention
of the writer.

M. J. R.

MJR/C

September 25, 1919.

Sears, Roebuck and Company,
Seattle, Wash.

Gentlemen: FORMAL 268

ATTENTION OF M. J. ROBINSON

Replying to your favor of the 19th inst., you are advised that the Commission has issued no orders to cease and desist in connection with its formal complaint against The Aeolian Company and The American Graphophone Company, et al.

Very truly yours,

Claude R. Porter,
Chief Counsel
for the
Federal Trade Commission.

SEARS, ROEBUCK AND CO.
SEATTLE, WASH.

268A

January 10, 1920.

Federal Trade Commission,
Washington, D. C.

Attention of Claude R. Porter, Chief Counsel.

Gentlemen:

Referring to your dockets Nos. 268
and 269, file No. JWN-WEF - J.N.N., Federal
Trade Commission vs. The Aeolian Company and
Federal Trade Commission vs. The American
Graphophone Company, et. al.

Kindly send us copies of any rulings
or decisions which have been entered in these
cases.

These cases have been pending since
last May.

Thanking you in advance for this
courtesy, we are

Yours truly,

SEARS, ROEBUCK AND COMPANY ✓

Per

M. J. Robinson

C

P.S.

Please address your reply for the
attention of the writer.

M.J. R.

January 17, 1920.

Sears, Roebuck and Co.,
Seattle, Washington.



Attention of Mr. M. J. Robinson

Dear Sir:

Answering your favor of January 10, 1920,
relative to our Dockets 268 and 269, I beg to suggest
that the Commission has not as yet entered its final
ruling in either of these cases.

Respectfully,

Chief Counsel.

268-B
264
SEARS, ROEBUCK AND CO.
SEATTLE, WASH.

May 18, 1920.



Federal Trade Commission,
Washington, D. C.

Attention of Claude R. Porter, Chief Counsel.

Gentlemen:

We thank you for your courtesy in
advising us regarding the cases now pending
against the Aeolian Company and American
Graphophone Company, et al.

If the Commission succeeds in having
the Circuit Court of Appeals' decision in the
Beech-Nut Packing Company case reversed, we
would be pleased to have you place our request
on file so that we may receive a copy of the
final decision in the cases above mentioned.

Yours truly,

SEARS, ROEBUCK AND COMPANY

Per M. J. Robinson
Per E.

C

File



PUBLISHERS
FOX'S MUSIC TRADE DIRECTORY OF THE U. S.

EASTERN OFFICE: 105 W. 40TH ST., NEW YORK CITY
REPRESENTATIVES IN ALL LEADING CITIES

MAIN OFFICES: 25 EAST JACKSON BLVD., CHICAGO

December 18, 1920.

Federal Trade Commission,
2000 D St., N. W.
Washington, D. C.

DEC 20 1920

DOCKET DIVISION

Gentlemen:

We shall be much obliged to you if you will mail us, at your earliest possible opportunity, a copy of the order to cease and desist served upon the Aeolian Company, of New York City (No. 268 of your records).

Yours very truly,

MUSIC TRADE INDICATOR

Charles Klauber

MANAGING EDITOR

OK/JW

December 21, 1920.

Mr. Charles Klauber,
c/o Music Trade Indicator,
25 East Jackson Blvd.,
Chicago, Ill.

Dear Sir:

FORMAL NO. 268.

In response to your request of the 18th instant, there is enclosed herewith a copy of the Commission's report and findings, and order to cease and desist in Docket No. 268, its complaint against The Aeolian Company.

Very truly yours,

FEDERAL TRADE COMMISSION.

Enclosure. ✓

Adrien F. Busick,
Acting Chief Counsel.

DOCKET DIVISION

File 268-A-1

Docket No. 268

FEDERAL TRADE COMMISSION

vs.

THE AEOLIAN COMPANY

INVESTIGATION BY THE COMMISSION

Geo. D. Beattys
Attorney for respondent

Correspondence, Interviews, Etc.

BROOKLYN 11 FLATBUSH AVE.
 BRONX 367 EAST 149TH ST.
 NEWARK 895 BROAD ST.
 ST. LOUIS 1004 OLIVE ST.
 CINCINNATI 25 WEST FOURTH ST.
 INDIANAPOLIS 237 NO. PENNSYLVANIA ST.
 DAYTON 114 NORTH MAIN ST.
 ROCHESTER 38 EAST AVENUE.

THE AEOLIAN COMPANY

AEOLIAN HALL

29 WEST 42ND STREET

LONDON 135 NEW BOND ST.
 PARIS 32 AVENUE DE L'OPERA.
 MELBOURNE 252 COLLINS ST.
 SYDNEY 364 GEORGE ST.
 MADRID 24 AVENIDA DEL CONDOR
 DE PENALVER

RECEIVED
 MAY 6 1919
To Smith
 DOCKET DIVISION

New York, May 5, 1919.

Federal Trade Commission,
 Washington, D. C.

JWN -- Formal 268

Gentlemen:-

Your complaint against The Aeolian Company was referred to this department and has been received by me on my return from a trip out of the City.

Under your Rules of Practice, I notice that an answer must be filed within thirty days from the service of the complaint. Your letter accompanying the complaint was dated April 9th but the papers themselves were received by The Aeolian Company on April 14th last, and I notice that this corresponds with the postmark also on the envelope. Therefore, I am assuming that The Aeolian Company has thirty days from April 14th in which to prepare and file its answer. *OK. J.M.*

Yours very truly,

THE AEOLIAN COMPANY,

Geo. L. Beatty
 Legal Department.

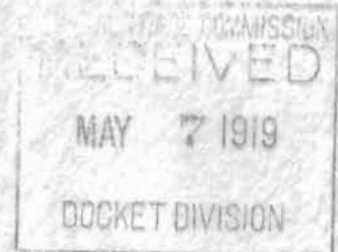
GDB:M

*Return receipt
 not rec'd 5-6-19
 J.M.*

ELS-IR 5-7-19.

May 7, 1919.

George D. Beatty, Esq.,
Legal Department, Acolian Company,
29 West 42nd Street,
New York City.



DOCKET #268.

Dear Sir:

In reply to yours dated the 5th inst. inquiring as to the time limited for the filing of the answer of the respondent in the above mentioned proceeding, you are advised that you are right in assuming that the respondent has thirty days from April 14, 1919 within which to file its answer.

Yours very truly,

Acting Chief Counsel
for the
Federal Trade Commission.

GEORGE D. BEATTYS
COUNSELOR AT LAW
111 BROADWAY
NEW YORK

268-A-1

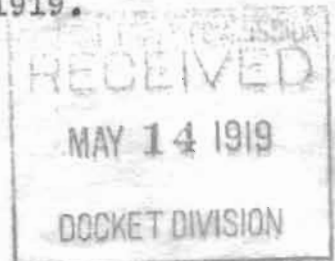
JWN
Formal 268

⑤

May 13, 1919.

Federal Trade Commission,
Washington, D. C.

Gentlemen:-



Attention of Secretary

I enclose herewith the answer to the complaint issued by your Commission. I assume that though you have made the return date May 26th, it will not be necessary for counsel to appear on that day unless he so desires, but that the answer will be filed and the case take its regular course.

I assume also that we will be notified of the taking of any testimony.

May I suggest that it might be wise to have a conference of counsel to agree on a statement of fact, as it is probable that certain facts at least can be agreed upon and possibly quite a complete statement covering the facts in issue.

Yours very truly,

Geo. D. Beattys

GDB:M

May 15, 1919. C

Mr. George D. Beattys,
111 Broadway,
New York City.

DOCKET 268 - THE AEOLIAN COMPANY

Dear Sir:

Your favor of the 13th instant enclosing respondent's answer to complaint in the above entitled proceeding was duly received, and the answer filed with the Commission. Your assumption that it will not be necessary for counsel to appear on the return day and that you will be notified of the date for taking of testimony herein is correct.

I note your suggestion that a conference of counsel be had in this case with a view to agreeing on a statement of facts, and the attorneys in charge of this case will be glad to have such a conference with you at any time that may suit your convenience. Please notify me a few days in advance of the date on which it will be convenient for you to come to Washington and confer with us on the facts of this case. Mr. Marshall B. Clarke, with whom I believe you are acquainted, has charge of the matter.

Yours very truly,

Acting Chief Counsel
for the
Federal Trade Commission.

MBC:HJK 7-17-19.

July 17, 1919.

Mr. George D. Beattys,
111 Broadway,
New York City.

Docket 258 - a - 1
The Aeolian Company.

Dear Sir:

Referring again to your letter of May 13th referring to the above proceeding, I desire to suggest that, if possible, this case be disposed of upon an agreed statement of facts, such as was referred to in your letter.

At the conference had with you in New York last month by Mr. Clarke, the attorney in charge of this matter, you outlined to him the salient facts of the case, but it is desired to have these in the form of a written statement from which a stipulation can be prepared.

I am, therefore, writing to ask if you will prepare and submit to the Commission a statement showing respondent's method of distributing its product, both in the past and at the present time, giving particular attention to the question of price maintenance agreements and of respondent's practice as to refusing to sell dealers who do not maintain prices.

What is desired in this statement is not so much an argument of the respondent's position or its intentions and purposes, as these matters are fully set forth in your answer; but a statement showing through just what class of dealers the respondent's goods are distributed, the arrangements made with them as to resale prices, and of steps taken by respondent to see that these arrangements are carried out. We should also like to have copies of any correspondence between the respondent and the dealers referring to this question of resale prices, both before and after the use of agreements was discontinued.

We should also like to have a concise statement of the same character showing the extent to which the respondent has carried out its practice of refusing to sell music rolls except to purchasers of its own organs.

It is usual in such cases for an examiner of the Commission to examine the files of the respondent with a view to obtaining the necessary data for preparation for trial or to be embodied in a statement of the facts, but it is assumed in the present case that such an examination will not be necessary, and that all of the essential facts will be voluntarily furnished by the respondent.

After such a statement has been furnished by you, the facts will be embodied in a proposed stipulation, which will be submitted to you in due course for signature.

Trusting that this procedure meets with your approval,

I remain,

Yours truly,

Claude R. Porter,
Chief Counsel for the Federal
Trade Commission.

GEORGE D. BEATTYS
COUNSELOR AT LAW
111 BROADWAY
NEW YORK

July 21, 1919.

Claude R. Porter, Esq.,
Chief Counsel for the Federal Trade Commission,
Washington, D. C.

Dear Sir:-



Docket 268 - The Aeolian Company.

Your letter of the 17th inst. received. Last Friday morning, July 18th, while I was at The Aeolian Company, I dictated a letter to Mr. Smith, which letter you will find enclosed. On returning to my downtown office late in the afternoon, I received your letter as I was leaving the City, to which I have just returned this morning. In view of this situation, I decided to forward to you this letter which I had intended to send today to Mr. Smith. This letter contains a proposition which I would be pleased to have you consider and advise me as to your views in reference to it.

I will await your reply before sending any statement as requested in your letter of the 17th.

I may state, however, in reply to this letter that there are various piano concerns in different cities in the United States which handle The Aeolian Company's piano product exclusively. With one or two exceptions there are no written agreements with them, though they are generally known by the term "agents". The Aeolian Company sells its product directly to them and they resell the goods and for many years did so in accordance with the one-price policy referred to in our answer filed with your Commission. There was never any pressure put upon these agents to resell at these prices, even when The Aeolian Company was maintaining this policy, because these dealers all seemed to

feel that it was in their own interest to sell them at a uniform price. There was never any occasion for The Aeolian Company to take any steps to see that this one-price policy was carried out. Since the change in this policy, though the agents are perfectly free to sell the goods at any price they see fit, as far as we are aware, there has been no agent that made any reduction in the resale price. There has been no correspondence between the Company and these dealers referring to this question of resale prices where this issue was raised, either before or after the change of this policy.

In reference to the phonographs, the distribution is somewhat different as The Aeolian Company has many more music houses scattered throughout the country handling its phonographs, and there are written contracts between most, if not all, of these concerns and The Aeolian Company. This form of contract, you will recall, did contain a price maintenance clause but, as our answer alleged, this was eliminated from the contract after the decision of the United States Supreme Court and prior to any inquiry by your Commission. Since the elimination of this clause from the contract, though these dealers have been perfectly free to sell the phonographs at any price they saw fit, I think the cases where any substantial reduction in the resale price has been made are very few. I am sure there has been no correspondence in reference to this matter between The Aeolian Company and any dealer in the way of any attempt on the part of The Aeolian Company to prevent such action, and I am sure there has been no pressure of any kind used by The Aeolian Company in this respect against any of the dealers.

In reference to the other part of your letter referring to the refusal to sell pipe organ music-rolls except to purchasers of its own organs, I would state that I now recollect only one other instance

other than the one used as the basis for the investigation by your Commission referred to in the answer filed with you. I have a more or less indistinct recollection of an instance of this kind brought to my attention several years ago by the Pipe Organ Department in which some person claimed that The Aeolian Company had no right to refuse to sell its pipe organ rolls to anyone who ordered them, and I recall at that time of advising the Department that they had a right to select its own customers and sell to whom they saw fit. As I recollect it, the incident ended there and nothing further was heard of it. The extent, therefore, to which The Aeolian Company "has carried out its practice of refusing to sell music-rolls except to purchasers of its own organs", as referred to in your letter, is exceedingly limited and has been confined to merely two or three instances.

As I recollect from my interview with Mr. Clark, he stated that no action could be taken by the Commission without having as its basis some agreed state of facts, and if you prefer I could prepare some proposed statement of facts and submit to to you for your consideration, based upon the facts set out in our answer. It seems to me, however, that it would be best to await your consideration of the contents of my letter to Mr. Smith because if you should decide to dismiss the claim in reference to the pipe organ rolls, the statement of facts could be much simplified.

Very truly yours,

GDB:M

Geo. Batty

GEORGE D. BEATTYS
COUNSELOR AT LAW
111 BROADWAY
NEW YORK

July 21, 1919.

Edward L. Smith, Esq.,
Acting Chief Counsel for the
Federal Trade Commission,
Washington, D. C.



Dear Sir:-

Docket 268 - The Aeolian Company.

A short time ago I had the opportunity, when Mr. Marshall B. Clarke was in New York City, of discussing with him the subject matter of your proceeding against The Aeolian Company. I tried to present as clearly and fully as I could the facts in reference to these claims and our position in the matter.

After giving further consideration to the subject, it has occurred to me that I would write you, making the suggestion that we consent to what appropriate action the Commission might see fit to take in reference to the first two counts embodied in Paragraphs Two and Three, and then request the Commission to dismiss the proceeding in reference to the matter embodied in paragraph Four; that is --

1. In view of the fact that we had eliminated all price fixing clauses from our contracts and had actually cancelled all arrangements with agents involving any price maintenance feature (which we did prior to any objection on the part of the Commission), we would have no objection to the issuance of an injunction by the Commission covering this matter, though, of course, the injunction itself would have to be in the form under which we could not be said to have surrendered any of our legal rights under the recent authorities like United States vs. Colgate & Co., and any others.

2. The provision of our phonograph contract which the Commission objected to and which is covered by Paragraph Three of the complaint was inserted in the contract by The Aeolian Company and made use of for a special purpose stated at length by us in Paragraph Third of the answer filed by us. We would naturally like to preserve this clause for the purpose for which we use it, but if objectionable to the Commission we would be willing to eliminate it from our contracts though we would like to have the right to at least provide that our goods should have at least equal representation.

In view of the fact that we have already changed our form of contract with all our dealers in order to eliminate the price maintenance clause, it would be quite embarrassing for us, and rather objectionable as well as entail a great deal of labor and trouble, to eliminate this clause from all existing contracts, and we would like the action of the Commission to provide simply for the elimination of this clause from future contracts if it would be willing to make the injunction in this form. It caused a good deal of disturbance, discussion and correspondence in reference to changing our contracts in the matter referred to, and it would be exceedingly unfortunate for us to be obliged to change the existing contracts again in this particular or any other.

3. In thus consenting to any action which the Commission might deem appropriate to take in connection with Paragraphs Two and Three, the consideration would be the dismissal of the cause of action involved in Paragraph Four of the complaint. This is a matter which, if there was any injunction issued in reference to it, might in the future effect us very seriously indeed. We have stated in the answer

filed, fully and at length, our reasons why no injunction should be issued by the Commission in this matter, but that the claim be dismissed. For the sake of bringing the matter to your attention without entering into details, the grounds on which we ask for this dismissal, among others stated in the answer, are the following:

(1) The Clayton act is not violated in either letter or spirit. Pipe organ music-rolls are not sold to either dealer or customer on any condition, agreement or understanding that the purchaser shall not use or deal in the goods of a competitor.

As a matter of fact, these rolls are not sold to or by the dealers. All orders for rolls come to The Aeolian Company, in the great majority of cases directly from the customers, though occasionally through the dealers; and all orders from whatever source are filled by The Aeolian Company and shipped by it direct to the customer.

These rolls are sold by The Aeolian Company to the customer absolutely free of any and all conditions whatever, except that they are to be paid for by him. He is absolutely free to make any and all use of them he desires.

Consider the allegations of Paragraph Four of the complaint, namely:

(a) "Respondent has refused to sell Aeolian pipe organ music-rolls x x x except to purchasers of pipe organs manufactured by it".

This is true. In other words, it lawfully selects its own customers without, however, any trade restraint. It is certainly a far cry from the Clayton Act to claim that the result of this refusal to sell these rolls creates a condition where, to get the benefit of Aeolian rolls, a person has to buy an Aeolian pipe organ and that hence this condition substantially lessens competition or tends to create a monopoly. Such

a construction of the Act is manifestly a greatly strained one. It is a narrow, artificial view of it.

Furthermore, a trader can refuse to sell to a proposing buyer for any reason he sees fit and "the Clayton Act has not changed the law in this particular".

Great A. & P. Tea Co. vs. Cream of Wheat Co.,
227 Fed. (C.C.A.) 46, 49.

In U. S. vs. Colgate Co., the Supreme Court held that the Sherman Act, in the absence of any purpose to create or maintain a monopoly, "does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell".

There would seem to be no substantial fundamental reason for claiming any different rule under the Clayton Act. Any such claim is purely technical.

The motive for declining to sell any customer is not the test of legality.

Baran vs. Goodyear Co., 256 Fed. 570, 573.

(b) Respondent "has prohibited dealers who sell Aeolian instruments, parts and accessories, from selling such rolls to any one other than the purchaser of an Aeolian pipe organ for use on such organ, although it is possible and practicable to use such rolls on pipe organs other than those manufactured and sold by respondent".

The Commission has been misinformed in this respect. There is no instance of any such prohibition. Dealers do not sell or handle these rolls. Respondent may have refused to sell these rolls to a dealer just as it has refused to sell to a single proposing customer,

and for the same reason, but that is all.

Furthermore, it is not "possible and practicable to use such rolls on pipe organs other than those manufactured and sold by respondent".

There is only one other pipe organ manufacturing concern in the United States which makes a pipe organ capable of using respondent's pipe organ rolls. For this purpose it has copied respondent's pipe organ structure and stop nomenclature to such an extent as to probably be guilty, under the authorities, of unfair trade. It is certainly not appropriate nor in the public interest for the Commission to recognize, encourage and aid such unfair methods of competition.

The contention that respondent's acts, hereinbefore referred to, violated the Clayton Act, is certainly not free from doubt; and this being so, the doubt should be resolved in favor of respondent, under all the circumstances and conditions heretofore and hereafter mentioned.

(2) For a competitor to copy respondent's organ structure and stop nomenclature used also on Aeolian pipe organ rolls for the manifest purpose of getting the benefit and taking unfair advantage of the time, skill and money employed in the creation and maintenance of respondent's pipe organ music-roll library, is to appropriate, without cost to itself, values created by respondent, and this is unfair competition under the decision of the Supreme Court in

International News Service vs. Associated Press,
39 Sup. Ct. Reporter, 68 (Oct. Term 1918).

Under these circumstances, to enjoin respondent from refusing to sell its pipe organ music-rolls to customers of such a competit-

or is to affirmatively encourage and aid and perpetuate unfair competition.

To create and maintain this Library of pipe organ music-rolls has involved a large amount of time, skill and capital. Respondent's competitor is unwilling to make this investment and incur the expense and loss. To issue any such restraining order, however, would compel respondent to either maintain its pipe organ music Library for the benefit and unjust advantage of competitors, and at a loss to itself, or to discontinue its pipe organ music-roll business to the very serious damage of respondent in its business.

(3) The right and the equities of the case are clearly with respondent and therefore any injunctive order against respondent cannot possibly be "to the interest of the public". That would be a contradiction in terms.

(4) Without regard to the question as to whether the facts of that particular case warranted, the Circuit Court of Appeals for the Second Circuit has held recently, in the case of Federal Trade Commission vs. Anderson Gratz, that "unfair methods of competition

between individuals are not contemplated by the Act x x x x. We think the unfair methods, though not restricted to such as violated the Anti-Trust Act, must be at least such as are unfair to the public generally. It seems to us that Section 5 is intended to provide a method of preventing practices unfair to the general public, and very particularly such as, if not prevented, will grow so large as to lessen competition and create monopolies in violation of the Anti-Trust Acts. x x x x No authority is given to any individual to present his grievances and the Commission is to interpose only in the interest of the public."

Even if there might be differences of opinion as to whether

this principle thus announced by the Court applies to the particular facts of this Gratz case, surely there can be no doubt that such a principle would apply to this Aeolian controversy. Such controversy is purely between two individual concerns and not the public generally. There is no general public seeking to purchase Aeolian pipe organ rolls. The only users are persons who own and use Aeolian pipe organs, except merely the few customers of a comparatively small competing pipe organ manufacturing concern referred to in the answer.

For these and other reasons specifically set forth in the answer, it would not only be very unfair to respondent but will result in substantial damage to it in many respects to force it to sell its pipe organ music-rolls indiscriminately as suggested.

For these reasons it is respectfully urged that this proceeding instituted by the Commission be adjusted by issuing the injunction of the Commission in respect to two of the claims and an order of dismissal in reference to this other pipe organ roll claim.

Yours very truly,

GDB:M

January 31, 1920.

George D. Beattys, Esq.,
111 Broadway,
New York City.

Docket No. 268 Aeolian Co.

Dear Mr. Beattys:

Owing to the fact that I have been engaged in the preparation and trial of a large number of other proceedings, I have not heretofore considered the proposition contained in your letter of July 21, last, with regard to the disposition of the above proceeding. Recently, however, I spoke to our Chief Counsel in regard to the matter and he seemed inclined to believe that the matter might be disposed of in the way you suggest. It has not, however, been the practice of the Commission to issue Orders based simply on the consent of the respondent or its attorney. The Federal Trade Commission Act provides for the filing by the Commission of its Report, containing its Findings as to the Facts and Conclusions, and on this Report the final Order to Cease and Desist is entered.

As a basis for such a Report, I have prepared and send you herewith two copies of a proposed Agreed Statement of Facts, to be signed by yourself and the Chief Counsel for the Commission. In drawing this statement I have not thought it necessary, under the circumstances, to go into the facts of the case at any great length, but have endeavored to set forth briefly the pertinent matters relating to the various provisions in respondent's contracts.

My idea is that on receipt and filing of such a Statement of Facts, Findings in substantially the same form can then be drawn and filed and on them an Order based such as you outline. This Order

would direct the respondent to Cease and Desist from entering into any agreements requiring dealers to maintain or adhere to any resale prices fixed or established by respondent, or words to that effect. I will submit to the Commission the question whether the use of the paragraph with regard to making the respondent's phonograph the unqualified leader in the hands of its various dealers is objectionable or not and I will endeavor to procure an Order providing for this subject substantially as you suggest, although, of course, I cannot be positive that the Commission will approve of the exact change of language you suggest.

I have made no reference to the matter of the organ rolls, my idea being that no Finding be made on that subject, but that the complaint as to that charge be dismissed, without prejudice, and I propose to so recommend.

If the enclosed Statement meets with your approval and you will sign and return it I will endeavor to have this matter disposed of in the near future.

Yours very truly,

Attorney and Examiner

GEORGE D. BEATTYS
COUNSELOR AT LAW
111 BROADWAY
NEW YORK

February 4, 1920.

Federal Trade Commission,
Washington, D. C.

Attention Mr. Marshall B. Clark.

Dear Mr. Clark:-

Docket 268-Aeolian Company -- I received your letter of January 31st with enclosed Agreed Statement of Facts, and I have signed the same and return it to you as it seems to me, as far as I can see, sufficiently accurate.

I note what you say about the provision in our phonograph contract as to making the same the unqualified leader in the hands of dealers. As I suggested in my letter, I presume we would have the right to demand that the dealer should give it equal prominence with any other instrument, and I cannot see how the Commission would have any objection to that.

One other condition about this particular feature I called to your attention too, namely, it would be very troublesome and embarrassing to us to attempt to make this second change in all the existing contracts, and so we would like this to apply to future contracts which could be changed accordingly. A provision could be inserted in the order of the Commission, if it felt it was necessary, that the Company would not attempt to enforce this provision in reference to any existing contract.

I note your statement that when you get this Statement of Facts, Findings in substantially the same form will be prepared and filed, and an order entered based upon them. Would it be

proper for me to have submitted to me a copy of this proposed order before it would actually be entered? I would appreciate this greatly if this privilege could be granted me. While we cannot legally require any dealer to maintain any resale price, my understanding is that the Supreme Court has made it clear that we could refuse to sell any dealer who did happen to cut the price and could announce in advance the fact that we would do so if we saw fit. I am not saying that we expect to do this and as a matter of fact we are not doing it, but certainly this right ought not to be impaired by any form of an order which the Commission might enter against us.

I note your statement that you have made no reference to the organ rolls and are prepared to recommend that no finding on that subject be made but that the complaint be dismissed on that charge. I have no doubt your recommendation will be accepted because this certainly is a fair and just disposition of the matter and fully protects the interests of both the public and The Aeolian Company.

Yours respectfully,

GDB:M

Geo. D. Beatty

GEORGE D. BEATTYS
COUNSELOR AT LAW
111 BROADWAY
NEW YORK

July 6, 1920.

Claude R. Porter, Esq.,
Chief Counsel, Federal Trade Commission,
Washington, D. C.

Dear Sir:-

Docket No. 268 Aeolian Company.



Confirming our talk in Washington a short time ago, I would say that the Aeolian Company would have no serious objection to such disposition of this case as you suggested might be considered by the Commission, namely, the entry of an order embodying an injunction along the lines discussed in reference to the first two counts as alleged in paragraphs two and three, and containing a provision dismissing the complaint embodied in paragraph four.

In accordance with your suggestion, I herewith send you a brief outline of our argument or reasons contained in our answer and memorandum why the complaint in reference to the pipe organ rolls should be dismissed, so you may have the matter clearly in mind for consideration and advice to the Commission.

The Aeolian Company does not now, and never has sold its pipe organ rolls on any condition, agreement or understanding that the purchaser shall not use or deal in the goods of a competitor, or on any other condition whatever except the payment of the price. This same thing is true in reference to all sales of its pipe organs.

No matter how broadly construed, it would seem to be impossible to bring the case within the provisions of the Clayton Act, not alone in letter but even within its spirit.

It is difficult to believe that Mr. Clarke himself, who has investigated this case and is familiar with the facts, can entertain

the opinion that there is any question of any violation of the Clayton Act. I pass, therefore, to the question as to whether any alleged act of The Aeolian Company has violated the provisions of Section 5 of the Federal Trade Commission Act which declares unlawful any unfair methods of competition.

Fundamentally, no method of competition on the part of The Aeolian Company of any kind is really involved. The pipe organ rolls of The Aeolian Company are not now and never have been sold to or by dealers except perhaps in a few isolated cases to fill a special order of some Aeolian Company's customers. These rolls are not advertised or placed on the market. They are not sold separately from its organ, and never have been. They are really a part of the organ, as the Supreme Court has itself held in White-Smith vs. Apollo, 209 U. S. 1, 18, as our former Brief stated. The present method of conducting its business was pursued for many years without any question of competition ever arising. This case now before the Commissioner would never have arisen as any matter of "competition in commerce" except for the fact that two or three years ago, or less, the Estey Organ Company changed the construction of some of its organ parts to conform with the Aeolian Company structure which it copied, and also copied and adopted the Aeolian Company's stop nomenclature, which appears also on the rolls for use in the playing of them. This was done for the sole purpose of adapting its organs for the playing of the Aeolian rolls. The Estey organ is much cheaper than the Aeolian organ and when the proposed purchaser calls attention to the great advantage of the Aeolian Library of pipe organ rolls, the representation is made that these rolls can be purchased of The Aeolian Company and used on the Estey organ. To create and maintain this Library of

pipe organ music-rolls has involved a long time, great artistic skill, and a very large outlay of capital; and some of these rolls are so expensive to produce that they have to be marketed at a loss. The Estey Company is unwilling or unable to make the large investment and incur the expense and loss involved in creating and maintaining its own library. Instead, it copies the Aeolian organ structure and stop nomenclature for the sole purpose of getting the benefit and taking unfair advantage of the time, skill and money expended by The Aeolian Company, and thus to appropriate without any cost to itself the great value of this Library of music-rolls. The Supreme Court has quite recently defined such conduct as unfair competition.

International News Service vs. Associated Press,
39 Sup. Ct. Reporter 68; 248 U.S.215.

Under these circumstances, to enjoin The Aeolian Company from refusing to sell its pipe organ music-rolls to customers of such a competitor, is to encourage aid and abet unfair competition in commerce, the very thing which the Commissioners are empowered to prevent by the Federal Trade Commission Act.

The Aeolian Company verily believes that it has done and is doing nothing that it is not clearly entitled to do and justified in doing. It will certainly result in more or less damage to the Company to issue any injunction order as suggested, and as the equities of the case seem to be clearly with the Company, it urges the Commission with much confidence, that justice would seem to require a dismissal of this third count in reference to the pipe organ rolls.

Very truly yours,

Geo. D. Beatty

FEDERAL TRADE COMMISSION
WASHINGTON

November 23, 1920.

Mr. George D. Beattys,
29 West 42nd St.,
New York City, N. Y.

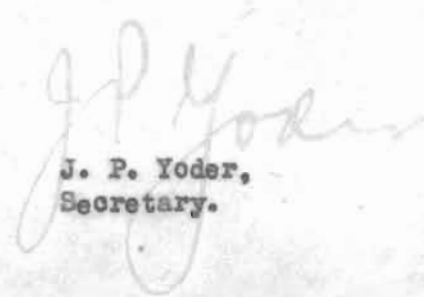
FORMAL NO. 268. - a-1

Dear Sir:

There is being sent herewith, by registered mail,
a copy of an Order to Cease and Desist recently entered by
this Commission in its proceeding against The Aeolian Company.

By direction of the Commission.

Very truly yours,


J. P. Yoder,
Secretary.

Enclosure:

Beatty

268-a-1

GEORGE D. BEATTYS
COUNSELOR AT LAW
111 BROADWAY
NEW YORK

January 24, 1921
RECEIVED
JAN 25 1921
DOCKET DIVISION

Federal Trade Commission,
Washington, D. C.

Gentlemen:-

In re Aeolian Company, Docket No. 268 a- please
find enclosed herein report of The Aeolian Company as directed
by your order of November 23, 1920, served upon us on November
24th.

Trusting this report is in a form satisfactory to
your Commission, I am

Yours very truly,

George D. Beatty

GDB:M